(14)

No. 95-1858

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

DENNIS C. VACCO, Attorney General of the State of New York; GEORGE E. PATAKI, Governor of the State of New York; and ROBERT M. MORGENTHAU, District Attorney of New York County,

*Petitioners*,

—v.—

TIMOTHY E. QUILL, M.D.; SAMUEL C. KLAGSBRUN, M.D.; and HOWARD A. GROSSMAN, M.D.,

*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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This brief *amici curiae* is respectfully submitted on behalf of Jerome J. De Cosse, Joseph George, Kenneth Prager, Richard Gallagher,[1] Robert J. Walsh, Alan B. Astrow, Ira Wagner, Mary Elizabeth Lell, Tony Barba, Lorna Cvetkovich, Kim Hardy, James Scheidler, Lynne Kavulich, Linda Long,

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[1] *Amici* De Cosse, George, Prager and Gallagher submitted affidavits describing their support for New York's prohibition against physician assisted suicide in the district court proceeding.

Steve Najarian, Richard Taylor, Ruth Taylor, Sally White and the Metropolitan Catholic Physicians Guild[2] by the Legal Center for Defense of Life, Inc. in support of Petitioners' brief to reverse the judgment of the United States Court of Appeals for the Second Circuit entered on April 2, 1996.

Pursuant to Rule 37.3 of the Rules of this Court, *Amici* have obtained and file herewith the written consent of each of the parties to the filing of this brief.

## INTEREST OF THE AMICI CURIAE

Amici are physicians opposed to the practice of physician-assisted suicide. The decision of the Court of Appeals for the Second Circuit will greatly impact medical professionals, like the *amici*, who are personally and professionally opposed to physician-assisted suicide. There is bitter irony in the fact that members of the same profession that is entrusted by the

[2] The individual members of the Metropolitan Catholic Physicians Guild include Karl P. Adler, Joseph M. Andronaco, John Baker, John D. Cahill, Robert E. Campion, Elvira M. Carota, James P. Casey, Antonio Cavalli, Arnold J. Cerasoli, John A. Cinelli, Joseph B. Cleary, John W. Conroy, Albert De Martino, Joseph D. DeCarlo, Louis R. Del Guercio, Anthony Diagonale, James Doyle, William J. Farrell, Joseph C. Fink, Thomas J. Forlenza, Andrew T. Furey, Robert Furlong, James T. Geddis, Edwin A. Hagerty, Jane Haher, Ralph Imperato, Rita C. Jaeger, James L. Januzzi, Paul L. Juan, Raymond Kiernan, John P. Landi, Michael N. Lavacca, John R. Locascio, Ralph Lucariello, Robert E. Madden, Emil Maffucci, Carolyn A. Martin, Robert E. Martin, Bento R. Mascarehas, Joseph Masdeu, Martin F. McGowan, Edward J. McDermott, Charles K. McSherry, John R. Meharg, Frank A. Migliorelli, Diana I. Monti, Saverio G. Mortati, Joseph Mucci, Alfred W. Murphy, Michael Murphy, Khaschayor Nainzadeh, Nahid Nainzadeh, Thomas F. Nealon, Oscar A. Palatucci, William F. Panke, Joseph T. Pedulla, Peter Pelligrino, Charles Pierre, Louis Piro, Francis J. Porreca, Edward J. Powers, R.F. Procario, Thomas M. Reilly, Benedict M. Reynolds, Anthony Riario, Charles A. Ricciardelli, Dorothy J. Richardson, Charles A. Rizzo, Thomas D. Rizzo, J. Anthony SanFilippo, Ludovit Sevcik, Vincent Squilla, Tullio F. Tartaglia, Carlos T. Tejada, Leslie H. Tisdall, Liliana Trivelli-Alessi, and Paul Tucci.



people of New York State to preserve and protect human life are now blessed by the decision of the court below with the permission to destroy life. Accordingly, to ensure that the ethics of medical practice remain life-oriented, the Center respectfully submits this brief on behalf of *amici curiae* in support of Petitioners' argument to reverse the decision of the court of appeals.

## SUMMARY OF ARGUMENT

The decision of the court of appeals is fundamentally flawed and must therefore be reversed. The court of appeals based its decision on the untenable assumption that the withdrawal of extraordinary means of life support is no different than the provision of the means to hasten death. In equating the two without any evidentiary support, the court of appeals disregarded the overwhelming medical, ethical and historical opinion to the contrary.

Even assuming *arguendo* that the court of appeals' assumption is correct and that New York State does not treat those similarly circumstanced people alike, it committed an even more unfathomable error when it held that New York State has no rational basis related to a legitimate state interest for prohibiting assisted suicide while simultaneously allowing "similarly situated" patients to discontinue life-saving treatment. To the contrary, the State has numerous compelling interests which are properly fostered by the penal sanctions against assisted suicide. The State's interests are critical: to preserve human life; to avoid a threat to the lives of those citizens least able to protect themselves against pressure to consent to an early death; to regulate the physician-patient relationship by maintaining the high ethical standards of the medical community; and to protect the members of the medical profession from the compelled violation of their professional standards and individual consciences that require them to prolong and protect human life.

Finally, and most fundamentally, in striking down New York's laws against assisted suicide, the court of appeals usurped the exercise by New York State of its classic police powers to safeguard the lives and welfare of their citizens. There is no conceivable justification either constitutional or otherwise for the decision of the court of appeals to impose its uninformed lay judgment on an issue which the New York Legislature and Executive are competent to and have addressed as recently as 1994.

## ARGUMENT

### I.

### THE COURT BELOW ERRED IN HOLDING THAT NEW YORK'S STATUTE CRIMINALIZING ASSISTED SUICIDE FURTHERED NO LEGITIMATE STATE INTEREST

The Second Circuit held[3]—we submit correctly—that no fundamental right is infringed by New York's criminal prohibition of assisted suicide:

> "[T]he statutes plaintiffs seek to declare unconstitutional here cannot be said to infringe upon any fundamental

[3] Respondents urged the court below to recognize that they have an unfettered constitutional right to commit suicide and to receive (and, in the case of physician-respondents, to render) assistance in the furtherance thereof. Such a right, they urged, was premised on the fundamental rights to privacy and other personal decisions which themselves are tenuous at best and from which Respondents expected the court below to further infer fundamental rights to commit suicide and to receive the assistance of a third party who in turn had a fundamental right to so assist. The court below properly rejected this absurd invitation to recognize a putative right premised on a quadruple implication. *See Bowers* v. *Hardwick*, 478 U.S. 186, 193 (1985) (refusing to take an expansive view of Court's authority to "discover" new fundamental rights imbedded in the Due Process Clause).



> right or liberty. As in *Bowers*, the right contended for here cannot be considered so implicit in our understanding of ordered liberty that neither justice nor liberty would exist if it were sacrificed. Nor can it be said that the right to assisted suicide claimed by plaintiffs is deeply rooted in the nation's traditions and history. Indeed, the very opposite is true." 80 F.3d 716, 724 (2d Cir. 1996).

Having thus properly understood and applied this Court's admonition in *Bowers* v. *Hardwick*, *supra*, 478 U.S. at 194, against "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution," the court of appeals proceeded to violate that directive under the color of applying the Equal Protection Clause.

The court of appeals erroneously held that New York State "does not treat similarly circumstanced people alike" and that New York has no rational basis for distinguishing between allowing physicians to withdraw life support upon the request of a competent patient and prohibiting physicians from complying with a patient's request for lethal drugs. In equating the withdrawal of extraordinary means of life support with the provision of a vehicle for suicide, the court of appeals unabashedly ignored the overwhelming body of medical and legal opinion to the contrary and its holding is therefore fundamentally flawed.

There is an undeniable distinction between directly causing death by an affirmative act and simply allowing death to occur by withholding treatment. The act of suicide requires the specific intent to die; the refusal of medical treatment evidences only an intent to forego extraordinary measures to sustain life and to allow nature to take its course. This distinction has been recognized by many courts. *See, e.g.*, *Thor* v. *Superior Court*, 5 Cal. 4th 725, 741-42, 21 Cal. Rptr. 2d 357, 367, 855 P.2d 375, 385 (1993) (recognizing distinction between rejection of medical intervention which will prolong affliction

and initiation of a course of events aimed at own demise); *In re Estate of Longeway*, 133 Ill.2d 33, 42, 549 N.E.2d 292, 296 (1989) (noting that termination of artificial means of life support does not deprive patient of life; patient's inability to breathe or swallow as a result of his illness is the "ultimate agent of death"); *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 743 n.11, 370 N.E.2d 417, 426 n.11 (1977) (noting that patient's refusal of treatment does not mean patient has specific intent to die).

Moreover, even assuming *arguendo* that New York's statutes treat similarly situated persons unequally, the court below erroneously concluded that the state lacks a rational basis "related to [a] legitimate state interest" for distinguishing between patients seeking assistance in committing suicide and those seeking to decline or discontinue their current medical treatment. Although, as the court below correctly recognized, the court need only find a "rational basis" for the different treatment in order to sustain the challenged statutes, *amici curiae* respectfully suggest that the state's interests in banning physician-assisted suicide are in fact compelling.

In addition to the compelling state interests articulated in the Attorney General's brief below (*i.e.*, the preservation of life, the prevention of manslaughter and homicide, and the protection of its most vulnerable citizens), the ban on assisted suicide is clearly justified by the unique state interests in regulating the practice of medicine upon its citizens and maintaining the ethical integrity of the medical profession, as well as protecting the medical profession from the unwarranted medical and ethical dilemmas that would surely result if this Court strikes down the prohibition against assisted suicide.

### A. New York Has an Interest in Regulating the Physician-Patient Relationship

The regulation of physician-assisted suicide is inextricably intertwined with the State's interest in regulating the physician-patient relationship and maintaining the high ethical



standards of its medical community. It is well settled that states are empowered under their police power to regulate the practice of medicine upon its citizens. *See, e.g.*, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Damino* v. *O'Neill*, 702 F. Supp. 949 (E.D.N.Y. 1987).

Consistent with its police power, New York's laws against assisted suicide protect the sanctity of the physician-patient relationship from undue influence beyond the professional judgment of the doctor. For example, the New York State Task Force on Life and the Law recently concluded that allowing physicians to assist suicide or directly kill patients would be profoundly dangerous for many patients, especially poor or socially disadvantaged patients, who might feel pressured to request early death. *See When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context*, May 1994, at pp. 6-8. The Task Force noted that "no matter how carefully any guidelines are framed, assisted suicide . . . will be practiced through the prism of social inequality and bias that characterize the delivery of services in all segments of society, including health care." *Id.*

New York's assisted-suicide ban also serves to maintain the ethical integrity of the medical profession. *See Donaldson* v. *Lungren*, 2 Cal. App.4th 1614, 1620, 4 Cal. Rptr. 2d 59, 62 (Cal. App. 2d Dist. 1992) (maintaining the ethical integrity of the medical profession is a pertinent state interest). Indeed, New York's prohibition against physician assisted suicide is consistent with the state's prevailing medical ethical standards.[4] As such, the laws against assisted suicide should be

[4] The medical community of New York State has overwhelmingly rejected the practice of assisted suicide. For example, in addition to the recent recommendation against legalizing physician-assisted suicide by The New York State Task Force on Life and the Law, a task force comprising the highest levels of faculty and administration of the University of Rochester Medical Center has unanimously rejected recent proposals that medical professionals should actively assist patients who wish to end their lives. The task force considered and rejected Respondents' arguments in favor of the right they seek to have this Court create. The task

upheld; the ethics of the medical profession have always been and must remain life-oriented.

### B. New York Has an Interest in Protecting the Integrity of the Medical Profession

New York State is also justified in banning assisted suicide to protect members of the medical profession from being compelled to kill their patients. The State's interest in protecting its medical professionals has long been recognized by the courts. For example, in *United States* v. *George*, 239 F. Supp. 752 (D. Conn. 1965), the court was confronted with a Jehovah's Witness who had refused blood transfusions for religious reasons. In ordering the transfusions, the court acknowledged the state's interest in protecting the consciences of its medical professionals:

> "In the difficult realm of religious liberty it is often assumed only the religious conscience is imperiled. Here, however, the doctor's conscience and professional oath must also be respected. In the present case the patient voluntarily submitted himself to and insisted upon medical care. Simultaneously he sought to dictate to treating physicians a course of treatment amounting to medical malpractice. To require these doctors to ignore the mandates of their own conscience, even in the name

force's report states: "The act of suicide raises complex psychological, ethical, social and legal issues. Without passing judgment upon these many dimensions of a complex problem, the Task Force does not believe that it is ethical, desirable, or appropriate for members of the healing professions to render assistance to suicide attempts. The historical proscriptions against suicide and euthanasia within the healing professions are very strong. To violate them would risk great harm to the trust and confidence which the public still imposes upon us. If present trends in our society continue, suicide organizations and la[illegible] practitioners may abound, but the healing profession should not participate." *Report of the Task Force of the University of Rochester Medical Center on Practitioner-Assisted Suicide*, January 1994, at p. 2.



> of free exercise, cannot be justified under these circumstances." *Id.* at 754.

Respondents' requested relief, if granted, will necessarily result in severe ethical problems for the overwhelming majority of physicians, who as a matter of conscience will refuse to abide by their patients' "wishes" to be murdered. New York's laws against assisted suicide protect these physicians from the exposure to malpractice liability that would surely result should the court of appeals' decision stand. *See Eichner* v. *Dillon*, 73 A.D.2d 431, 456, 426 N.Y.S.2d 517, 537 (2d Dep't 1980) ("It has also been said that the State has a compelling interest in maintaining the ethical integrity of the medical profession by protecting physicians against the compelled violation of their professional standards and against exposure to the risk of civil or criminal liability"), *aff'd as modified sub nom. Matter of Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, *Storar* v. *Storar*, 454 U.S. 858 (1981); *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1009 (D.C. Cir.) (noting that doctors' choice of either administering blood transfusion or letting patient die in hospital bed exposed them and hospital to risk of civil and criminal liability), *cert. denied*, 377 U.S. 978 (1964); Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 Fordham L. Rev. 1, 29-33 (1975).

### C. The Court of Appeals Usurped the Role of the New York Legislature

This Court's established Equal Protection jurisprudence prohibits judicial usurpation of legitimate State legislative power. Where, as here, the State Legislature has exercised its traditional police power to prohibit conduct found to be inimical to its citizens[5], this Court has required Federal judicial

[5] Until the decision of the Second Circuit and that of the Ninth Circuit in *Compassion in Dying* v. *State of Washington*, 79 F.3d 790 (9th Cir. 1996)(en banc), no one would have doubted the power of the several

deference to State law whenever that law has a rational relationship to a matter of legitimate State concern[6]. The expansive reading of the Equal Protection Clause by the court below exceeds the limited judicial power granted by the United States Constitution to the judicial branch.

The New York Court of Appeals, whose Constitution provides more expansive protection of individual liberties than the United States Constitution[7], has repeatedly rejected attempts to restrict the State's interest in preserving life. *Grace Plaza of Great Neck, Inc.* v. *Elbaum*, 82 N.Y.2d 10, 16, 623 N.E.2d 513, 515, 603 N.Y.S.2d 386, 388 (1993) ("Though our rule reserving the right to the patient is more inflexible than that followed by most of our sister States, it is within the power of the individual States to adopt such a rule and also to higher standards of proof for determining the wishes of incompetent persons than for determining the wishes of those who are competent"); *see also Matter of Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981), *cert. denied*,

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States to protect the lives of citizens by prohibiting conduct which has been the subject of criminal prohibition since the time of adoption of the Fourteenth Amendment. As this Court recognized in *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261, 280-81 (1990):

> "As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death." (Footnote omitted.)

[6] *See, e.g. United States* v. *Lopez*, ___ U.S. ___, 115 S. Ct. 1624 (1995); *Heller* v. *Doe*, 509 U.S. 312 (1993); *City of Dallas* v. *Stanglin*, 490 U.S. 19 (1989); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *McNaughton* v. *Johnson*, 242 U.S. 344 (1917); *Murphy* v. *California*, 225 U.S. 623 (1912); *Welch* v. *Swasey*, 214 U.S. 91, 29 S. Ct. 567, 53 L. Ed. 923 (1909).

[7] *See, e.g., People* v. *Scott*, 79 N.Y.2d 474, 490-91, 593 N.E.2d 1328, 1337-38, 583 N.Y.S.2d 920 (1992), and cases cited therein.



454 U.S. 858 (1981); *Matter of Westchester County Medical Center on behalf of O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988). These are judgments properly left under the United States Constitution to the political process in the several States. In the absence of a clear restriction on a fundamental constitutional right the federal courts lack the power to interfere in these judgments. What the Second Circuit did here usurped the judgment of generations of duly-elected members of the New York Legislature and effectively disenfranchised the citizens of New York.

## II.

## THE DECISION OF THE COURT OF APPEALS PROCEEDS UPON A FUNDAMENTALLY ERRONEOUS ASSUMPTION AS TO THE RELATIONSHIP BETWEEN PAINFUL TERMINAL ILLNESS AND THE PATIENT'S DESIRE FOR PHYSICIAN-ASSISTED SUICIDE

As is true for most of the non-medical experts involved in the public debate on physician-assisted suicide, the court below appears to accept the premise that terminally ill patients suffering unremitting pain are most likely to desire to end their life or seek physician assistance with respect thereto:

> "And what business is it of the state to require the continuation of agony when the result is imminent and inevitable? What concern prompts the state to interfere with a mentally competent patient's 'right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life,' *Planned Parenthood* v. *Casey*, 505 U.S. 833, 112 S. Ct. 2791, 2807, 120 L. Ed. 2d 674 (1992), when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness?" 80 F.3d at 730..

The court's emotive appeal to the public's fear of pain and suffering at the end of life is obvious. But it is submitted that the visceral logic involved is fatally flawed when measured against the evidence of what actually happens among terminally ill patients with unremitting pain.

A very recent study of attitudes toward euthanasia and physician-assisted suicide among terminal cancer patients, oncologists and the general public presents a remarkably different picture than that invoked by the court below:

> "One of our most striking findings is that patients who had seriously considered and prepared for euthanasia or physician-assisted suicide were significantly more likely to be depressed. Depressed patients were more likely than non-depressed patients to find that discussions of euthanasia or physician-assisted suicide increased trust in their physician. This finding does not imply that every patient who wants euthanasia or physician-assisted suicide is depressed. Nevertheless, these data, combined with studies on suicidal thoughts among patients with cancer and refusal of life-sustaining treatment among AIDS patients, imply that interest in and actions relating to ending life among patients with life-threatening illnesses are frequently associated with depression and psychological distress.
>
> "Patients experiencing pain were not inclined to euthanasia or physician-assisted suicide. This finding is consistent with data from the Netherlands demonstrating that pain was the only reason for euthanasia in just 10% of cases and a contributing factor in fewer than 50% of cases. It is also consistent with data from American physicians who had carried out euthanasia. The lack of interest in euthanasia or physician-assisted suicide among patients with pain may contribute to oncologists' opposition to these interventions and their sense that discussions of them will reduce patient trust. The results



> suggest that having pain does not predispose a person to desire or take actions to end his or her life. Patients with pain do not seem to view euthanasia or physician-assisted suicide as the appropriate response to poor pain management. Indeed, oncology patients in pain may be suspicious that if euthanasia or physician-assisted suicide are legalised, the medical care system may not focus sufficient resources on provision of pain relief and palliative care.
>
> "These data indicate a conflict between attitudes and probable practices related to euthanasia and physician-assisted suicide. The interventions were approved of for terminally ill patients with unremitting pain, but these are not the patients most likely to request such interventions. This discrepancy between attitudes and likely practices warrants a critical re-examination of the purpose and probable use of euthanasia or physician-assisted suicide." (Footnotes omitted)

Emanuel, Fairclough, Daniels and Clarridge, *Euthanasia and Physician-Assisted Suicide: Attitudes and Experiences Among Oncology Patients, Oncologists, and the Public*, Lancet 1996; 347 (9018): 1805-1810 (June 29, 1996), at pp. 14-15.

The above study strongly supports this Court's repeated admonitions to the federal courts to avoid usurpation of the exercise by the States of classic police powers to safeguard the lives and welfare of their citizens. There is no conceivable justification for the decision of the court below to impose its uninformed lay judgment on an issue which the New York Legislature and Executive are competent to and have addressed as recently as 1994.

## III.

## THE CONSTITUTION IS NOT THE SOURCE OF OUR FUNDAMENTAL HUMAN RIGHTS

There is an even more fundamental error in the approach of the court below—acceptance of the twentieth century judicial theory which posits that fundamental rights are found in the Constitution and are, therefore, subject to "discovery" or "elucidation" within the four corners of the Constitution itself. The political history of our country makes clear that a fundamental idea which united the otherwise disparate individuals who signed the Declaration of Independence was a rejection of the political notion that the King was the source of all individual rights (see Magna Carta). Rather, although there was a deep disagreement as to the form of government which should be formed to protect those rights, there was agreement that the rights themselves inhered in each individual and any form of government which violated those rights was illegitimate and could be overthrown, by force if necessary. This truly revolutionary idea found support in the foundational concept that the source of individual rights could not be any governmental authority, be it King or Parliament, nor any positive law or constitution. Only by accepting this concept could the signers of the Declaration legitimize their decision to sever ties with England by force of arms, which *de facto* was already under way, at least in the northern colonies.

The English philosopher whose work stands most behind the Framers of the Declaration of Independence was, as is well known, John Locke.[8] Locke's *Second Treatise of Government* is most relevant here; scholars of the Revolution gen-

[8] "[T]he great virtuosi of the American Enlightenment—Franklin, Adams, Jefferson—cited the classical Enlightenment texts . . . . In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract." BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967).



erally have agreed that it is this work which influenced Jefferson the most in drafting the Declaration of Independence.[9] When Jefferson wrote that "all men . . . are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness," it seems plain that Locke was his source, "but Jefferson, as is well known, departed from Locke's trinity of 'life, liberty, and estate' and substituted 'the pursuit of happiness' for the third of these."[10]

To understand what Jefferson meant by inalienable rights to life and liberty, it is useful to look to the *Second Treatise*, where Locke, in his chapter on "The State of Nature," observes:

> "though this be a State of Liberty, yet it is not a State of License, though Man in that State have an uncontrollable Liberty, to dispose of his Person or Possessions, yet he has not liberty to destroy himself, or so much as any Creature in his Possession, but where some nobler use, than its bare Preservation calls for it. . . . Every one as he is bound to preserve himself, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another."[11]

Later in the *Second Treatise* Locke returns to the theme that "a Man" does not have "the Power of his own Life":

[9] "That the central argument of the Declaration is based mainly upon John Locke's *Second Treatise* is indisputable." Forrest Macdonald, Preface to *Novus Ordo Seclorum* ix (1985).

[10] *Id.* at ix.

[11] John Locke, *Two Treatises on Government*, Second Treatise, at 270-71.

> "This Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together. For a Man, not having the Power of his own Life, cannot, by Compact, or his own Consent, enslave himself to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. No body can give more Power than he has himself; and he that cannot take away his own Life, cannot give another Power over it."[12]

Locke's firmly repeated anti-suicide theme expressed in another way—one more familiar to Americans—is that these rights are "inalienable"—*i.e.*, Jefferson's formulation is an expression of the demands of Locke's theory of natural rights.

This generally accepted understanding of the source of individual human rights and the function of the Constitution in protecting those rights somehow has been lost. As a result, we have reached a stage where the Constitution has been enshrined as the source of all individual human rights, thus permitting imperfect men and women, appointed to the federal judiciary for life, to "find" in the Constitution new rights as their individual vision of the good of the Nation informs them. This is, however, precisely the sort of unfettered power that the Founders sought to avoid granting to any governmental authority.

The impact of this flawed constitutional vision has been and continues to be the acceptance, even by jurists who purport to reject so-called "judicial activism" in favor of "strict construction" or "original intent," of the notion that the political compromise that was and is the Constitution, is the document to which the Nation must look as the source of individual rights. However, the authors of the Constitution had a much more limited view of their purpose, as the Preamble makes clear:

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12 *Id.*, Chapter IV, Sec. 23, at 284.



> "We the people of the United States, in order to form a more perfect union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . ."

As a consequence, this Court—a creature of the very Constitution it interprets[13]—has in its history gotten things very wrong indeed. A glaring example, but far from the only one, is *Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1856), in which Chief Justice Roger Taney and the majority of his cool and rational brethren held that Dred Scott, a black man then residing in Missouri, was and always would be "property" without the constitutional right to challenge his being dragged back into slavery with his family by his owner pursuant to the Fugitive Slave Act. Mr. Scott was no less a human person in 1856 than he was after the Emancipation Proclamation, and the Fugitive Slave Act of 1850, Ch 60, 9 Stat. 462 (1850), was never a law to which any citizen was morally compelled to adhere, Congress and the Supreme Court notwithstanding. *See, e.g.*, Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 Albany L. Rev. 671, 687-89 (1995).

An apt statement of the jurisprudential approach which could have served to avoid the lurid spectacle of the *Scott* decision is that of Justice Stephen Johnson Field, a former member of the California Legislature, in his dissent in *Powell* v. *Pennsylvania*, 127 U.S. 678, 692 (1888):

> "With the gift of life there necessarily goes to every one the right to do all such acts, and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor.

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13 *See* U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

> The right to pursue one's happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings, or by the force of legislative or constitutional enactments, but by their Creator; and to secure them, not to grant them, governments are instituted among men."

To the same effect is Justice Field's concurring opinion in *Butchers' Union Slaughter-House & Live-stock Landing Co.* v. *Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 756-67 (1884):

> "As in our intercourse with our fellow-man certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident'—that is so plain that their truth is recognized upon their mere statement—'that all men are endowed'—not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but 'by their Creator with certain inalienable rights'—that is, rights which cannot be bartered away, or given away, or taken away except in punishment for crime—"and that among these are life, liberty, and the pursuit of happiness, and to secure these'—not grant them but secure them—'governments are instituted among men, deriving their just powers from the consent of the governed.' "

It was to such principles of natural rights that Justice Curtis also appealed in his dissenting opinion in *Scott* v. *Sandford*, *supra*, 60 U.S. at 624 ("Slavery, being contrary to natural right, is created only by municipal law").



In the Twentieth Century one most often finds these principles expressed in the dissenting opinions of this Court. *See, e.g.*, Justice Marshall's dissent in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 322 (1976):

> "Whether 'fundamental' or not, ' "the right of an individual . . . to engage in any of the common occupations of life" ' has been repeatedly recognized by this Court as falling within the concept of liberty guaranteed by the Fourteenth Amendment. . . . As long ago as *Butchers' Union Co.* v. *Crescent City Co.*, 111 U.S. 746, 4 S.Ct. 652, 28 L.Ed. 585 (1884), Mr. Justice Bradley wrote that this right 'is an inalienable right; it was formulated as such under the phrase "pursuit of happiness" in the declaration of independence . . . . This right is a large ingredient in the civil liberty of the citizen." *Id.*, at 762, 4 S.Ct., at 657 (concurring opinion)."

*See also* Justice Ginsburg's dissent in *Sandin* v. *Conner*, ___ U.S. ___, 115 S. Ct. 2293 (1995):

> "I see the Due Process Clause itself, not Hawaii's prison code, as the well-spring of the protection due Conner. Deriving protected liberty interests from mandatory language in local prison codes would make of the fundamental right something more in certain States, something less in others. Liberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the "Liberty" enshrined among 'unalienable Rights' with which all persons are 'endowed by their Creator." Declaration of Independence; *see Meachum* [v. *Spano*], 427 U.S. 215, at 230, 96 S.Ct. [2532], at 2541 (STEVENS, J., dissenting) ('[T]he Due Process Clause protects [the unalienable liberty recognized in the Declaration of Independence] rather than the particular rights or privileges conferred by specific laws or regulations.')."

Nevertheless, these first principles are an essential starting point for any reasonable attempt to articulate a rights-based

constitutional jurisprudence, and without them "rights" become, in Mr. Dumpty's words, whatever the speaker says they mean.

Thus, our history teaches that whenever the federal Judiciary, at the height of their assumed powers, ignore the true source of the rights guaranteed by the Constitution, the result is inevitably a disaster. In addition to the obvious example of *Scott* v. *Sandford*, *supra*, numerous other judicial *bete noirs* may be recounted. In each such instance, application of the constitutional jurisprudence suggested herein could have avoided the heinous result. For example, in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), the Court upheld a Louisiana law requiring "separate but equal" intrastate railroad coaches, and thus permitted legislated public racial discrimination to persist half a century until *Brown* v. *Board of Education*, 347 U.S. 483 (1954) explicitly put an end to the fraudulent "separate but equal" doctrine.

We also seem too ready to forget that prior to the Nineteenth Amendment, women were denied the right to vote (and, often, other fundamental rights), despite the enactment of the Fourteenth Amendment. *See, e.g.*, *United States* v. *Anthony*, 24 F. Cas. 829 (C.C. N.D.N.Y. 1873), upholding the criminal conviction of Susan B. Anthony for the federal crime of voting in a Congressional election in 1872 in New York. In that case, Circuit Justice Hunt wrote:

> "The right of voting, or the privilege of voting, is a right or privilege arising under the constitution of the state, and not under the constitution of the United States. . . . If the state of New York should provide that no person should vote until he had reached the age of thirty years, or after he had reached the age of fifty, or that no person having gray hair, or had not the use of all his limbs, should be entitled to vote, I do not see how it could be held to be a violation of any right derived or held under the constitution of the United States." 24 F. Cas. at 830.



During the same period, the Supreme Court, forgetting the lesson of *Scott* v. *Sandford*, twice upheld the denial of fundamental rights to women, thus demonstrating a social blindness that it took the First World War to remedy. *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873) (holding that the Fourteenth Amendment did not entitle a woman to admission to practice as an attorney in Illinois); *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1875) (unanimously upholding denial of registration to vote in the 1872 general election to a Missouri woman). The very fact that these rulings today make us properly uncomfortable strongly counsels against the sort of judicial law-making engaged in by the court below.

Nor are such events confined to the Nineteenth Century. Consider the spectacle of a majority of this Court upholding the criminal conviction of a loyal native-born American citizen of Japanese ancestry for the "crime" of failing to leave his home in California in violation of an evacuation order of the local military commander directed only to Americans of Japanese ancestry. *Korematsu* v. *United States*, 323 U.S. 214 (1944). Justice Murphy's dissent is a powerful indictment of this modern failure to apply a proper constitutional analysis:

> "I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experi-

ment and as entitled to all the rights and freedoms guaranteed by the Constitution." 323 U.S. at 242.

The decision of the court below blatantly substitutes the personal views of three federal judges for the deliberations of elective members of New York's Legislature for over two decades—

> "At oral argument and in its brief, the state's contention has been that its principal interest is in preserving the life of all its citizens at all times and under all conditions. But what interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes. . . . And what business is it of the state to require the continuation of agony when the result is imminent and inevitable? What concern prompts the state to interfere with a mentally competent patient's 'right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life,' . . . , when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness? The greatly reduced interest of the state in preserving life compels the answer to these questions: 'None.' " 80 F.3d at 729-30 (Citations omitted).

A more obvious example of impermissible judicial law-making cannot be imagined. There is no fundamental right or suspect classification involved in New York's long-standing penal prohibition against assisted suicide. The New York Executive Branch appointed a blue-ribbon panel which investigated and reported on this very question in 1994. The New York State Task Force On Life and the Law concluded that no exception to the penal law against assisted suicide should be made for physicians requested by competent terminally ill adults to end their life. As is proper in the political process, the broad-based Task Force considered the moral, regulatory and political ramifications of the issue in the context of the conditions actually



prevailing in the State of New York at the end of the Twentieth Century. There is neither constitutional power nor warrant for usurpation of this process by the federal judiciary. This Court must reverse the pernicious denial of the right of the citizens of New York to have their will, as expressed for over two hundred years through their duly-elected legislative representatives, respected by the federal judiciary.

## CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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